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No. 91-329

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

REBEL MOTOR FREIGHT, INC.
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION;
UNITED STATES OF AMERICA
Respondents,

v.

SUNSHINE MILLS, INC.
Intervenor

ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S.COURT OF APPEALS FOR THE SIXTH
CIRCUIT

BRIEF OF RESPONDENT SUNSHINE MILLS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John Paul Jones
Box 3140
Memphis, TN 38173
901-527-2482
Counsel of Record
for Respondent
Sunshine Mills, Inc.

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
I. SUMMARY STATEMENT OF RESPONDENT'S POSITION	2
II. STATEMENT OF THE CASE	4
III. REASONS WHY WRIT SHOULD BE DENIED	13
A. REBEL WAITED OVER TWO YEARS AFTER SHIPMENT TO CLAIM UNDERCHARGES AND PREVENTED SUNSHINE FROM UTILIZING THE REPARATIONS STATUTE, 49 U.S.C. 11705(b) (3) BECAUSE OF THE TWO YEAR STATUTE OF LIMITATIONS, 49 U.S.C. 11706 (c) (2).	13
B. THE RULING BELOW FOLLOWS THE DECISIONS OF THIS COURT.	16
C. A 15-MONTH REVISIT OF FOOTNOTE 10 IS NOT IN THE PUBLIC INTEREST FOR A CARRIER IN LIQUIDATION, SUCH AS PETITIONER REBEL, WHO SHALL NOT SERVE IN THE FUTURE THE PUBLIC WHOM THE FILED RATE DOCTRINE IS DESIGNED TO PROTECT, RATHER THAN REBEL'S CREDITORS AND STOCKHOLDERS.	23

D. PRIMARY JURISDICTION CRITERIA-NOT "PROOF"-BEFORE A COURT IS REQUIRED FOR A RATE REASONABLENESS REFERENCE. IT WAS SATISFIED BELOW. REBEL MISSTATES RECORD. 26

IV. CONCLUSION 29

TABLE OF AUTHORITIES

PAGE

CASES

Branch Motor Exp. Co. v. Caloric Corp., 914 F.2d 241 (3d Cir. 1990) 12

Distrigas of Massachussets Corp. v. Boston Gas Co., 693 F.2d 1113 (1st Cir. 1983) 26

Far East Conf. v. United States, 342 U.S 570, 574-75 (1952) 28

General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433, 60 S. Ct. 325, 331, 84 L.Ed. 361 (1940) 19

James B. Orr et al v. Interstate Commerce Commission et al, 912 F.2d 119 (6th Cir.1990) 9

James G. Duffy, Trustee v. BMC INDUSTRIES,INC., 938 F.2d 353 (2 Cir. 1991) at 357-8 15

Lowden v. Simmonds-Shields-Lonsdale Grain Co., 306 U.S. 516 (1939) 18, 21

Maislin Industries, Inc. et al v. Primary Steel, Inc., 705 F. Supp. 1402, 497 U.S.___, 110 S. Ct. 2759, 111 L.Ed.2d. 94 (1990) 2,4,8, 9,10,12 13,20, 21

NITL-Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C. 2d 99, 100 (1986) 7

Pennsylvania R. Co. v. United States, 363 U.S. 202 (1960) 16,21

Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement Ex Parte No. MC-177 (Sub-No. 2), 8 I.C.C. 2d 61 (1991) 5

Rohr Industries v. Wash Metro Area Transit Authority, 720 F.2d 1319 (D.C. Cir., 1983) 28

United States v. Western Pac. R. Co., 352 U.S. 59 at 63 (1956) 17,21,23

Westinghouse Electric Corp. v. United States, 388 F.Supp. 1309 (USDC, W. D. Pa., 1975) 10,11,27

STATUTES

Interstate Commerce Act

49 U.S.C. 1114.21..... 3

49 U.S.C. 10101 (a) (2) (D)..... 23

49 U.S.C. 10701..... 13

49 U.S.C. 10701 (e)..... 10

49 U.S.C. 10761..... 24

49 U.S.C. 10762..... 24

49 U.S.C. 11705 (b) (3)..... 13

49 U.S.C. 11706 (c) (2)..... 13

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I. SUMMARY STATEMENT OF RESPONDENT'S POSITION.

This Court has no need for a 15-month revisit now to footnote 10 in Maislin cited below at the urging of this non-operating carrier. The ICC has on September 4, 1991 fully "explored" the rate reasonableness issue by its extended discussion of that issue, in the wake of Maislin. It has provided sufficient alternative directions for the shippers and carriers to follow concerning undercharges and rate reasonableness. Reparations statutes do not require a shipper to pay the carrier before alleging an unreasonable rate defense to an undercharge claim by the latter. If they do, then, Petitioner Rebel Motor Freight, Inc. waited after the nine shipments involved here for more than the two years' limitation period to claim undercharges, thereby depriving Respondent Sunshine Mills, Inc. of its right to

pay the tariff rate and make such a claim. Rebel's rates are from 167% to 186% higher than that of Rebel's competing carriers in the territory in the last half of 1983. The rate Sunshine paid was the rate level required to move the traffic, not the filed rate. 49 C. F. R. 1114.21, the I.C.C. discovery rules, will permit Sunshine to determine from Rebel if backhauls were involved, and what its costs were, if it has any 1983 records to support its undercharge claim for that period. Under all of the criteria, Rebel's rates were unreasonable. The Sixth Circuit's reference to the ICC for this non-operating carrier preserves the basic requirement of statutory reasonableness for Rebel's rates. Sunshine carried the burden on establishing primary jurisdiction for a reference of this case to the administrative agency, without offering proof, under these circumstances. Proof is not required in

every instance for a primary jurisdiction reference. Petitioner's position here is only a complaint by it that "it would be grossly unfair and inequitable to require Rebel to recommence the litigation after having already waited over four years for its day in court." The carrier in Maislin has waited two years longer. See 705 F. Supp. 1402. That is the real world. This Court's resources have better use than to accelerate Petitioner's litigation schedule for its unreasonable rates.

II. STATEMENT OF THE CASE.

This case is not what Rebel represents it to be: a "continuation of the dispute" discussed by this Court in Maislin Industries, Inc. et al v. Primary Steel, Inc., 497 U.S. ___, 110 S. Ct. 2759, 111 L.Ed.2d. 94 (1990). There is no "dispute". The Opinion below follows Maislin's pronouncement of the filed rate doctrine.

On September 4, 1991, after the filing of the subject Petition, the ICC served Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement Ex Parte No. MC-177 (Sub-No. 2), 8 I.C.C. 2d 61 (1991). It is lodged with this Response. It denied petitions for a policy statement. However, it fully discussed the law concerning rate reasonableness, and concluded at 78-9: "The matters and case law discussed above should afford sufficient guidance to the public, setting forth as it does some idea of what arguments the Commission considers relevant..."

Between October 6, 1983, and December 30, 1983, Petitioner Rebel transported nine truck shipments for Respondent Sunshine at a rate negotiated and mutually agreed upon between them on June 18, 1983, which was paid. All of the shipments were from Tupelo, MS to points in Texas. The last shipment was on December

30, 1983. In February, 1986, Rebel ceased operating its Certificate, and began to liquidate. It owned equipment and a terminal which had a lien on it in favor of Rebel's creditors in three states.

In the first part of 1986, Rebel engaged the services of Professional Truck Auditing, Incorporated, Bryant, AR to audit its freight bills. Its compensation was a 50% contingent fee to the auditor of monies received by Rebel for undercharges discovered by the auditor and paid at a subsequent date by its former customers including Sunshine. It was not until early 1986, after Rebel attempted to collect and Sunshine refused to pay the $6007.60 claim for undercharges created by Professional Truck Auditing that Sunshine learned that the rate quoted on June 18, 1983 and paid in 1983 had not been published in a tariff.

Rebel did not dispute the above pleadings

and evidence offered by Sunshine before the ICC. (Petition, 9a)

Two years duration from the last shipment on December 30, 1983 for a Memphis-Texas shipment ended on or about December 30, 1985, several days or weeks before Rebel in February, 1986 began to liquidate, and engaged the services of Professional Truck Auditing.

After Sunshine refused in 1986 to pay Rebel's undercharge claim, Rebel on September 20, 1986, filed suit against Sunshine in the General Sessions Court of Shelby County, Tennessee. Its jurisdictional amount limit is $15,000.00.

On October 29, 1986, the ICC announced and concluded that in future referrals in undercharge cases, it would "decide if the collection of undercharges would be a reasonable practice." NITL- Petition to Institute Rulemaking on Negotiated Motor Common Carrier

Rates, 3 I.C.C. 2d 99, 100 (1986) (Negotiated Rates 1). That was the origin of its Negotiated Rates policy. Maislin, supra, p. 2763.

Sunshine followed that then announced precedent of the ICC, and the Negotiated Rates Policy, and moved the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis to refer the case to the ICC for the determination of whether the undercharges at issue were an unreasonable practice. Any defense of unreasonable rates to Rebel's undercharge claim would have been at that time futile, in view of that announced precedent and policy of the administrative agency with jurisdiction of the subject matter. That was the state of the law.

That court on August 4, 1988, referred under the doctrine of primary jurisdiction the case to the Interstate Commerce Commission for a "determination of whether the undercharges

sought to be collected by plaintiff under all the circumstances would be an unreasonable practice." (Petition, 8a)

Rebel offered no evidence to the Commission. (Petition, 9a)

On July 31, 1989, the I.C.C. concluded that it would be an unreasonable practice for Rebel to collect these alleged undercharges from Sunshine. On September 25, 1989, Rebel appealed that decision to the United States Sixth Circuit Court of Appeals. (Petition, 11a)

The Sixth Circuit stayed this case pending the disposition of another undercharge case involving similar facts and issues. James B. Orr et al v. Interstate Commerce Commission et al, 912 F.2d 119 (1990). After Maislin, and a decision in the Orr case, adverse to Rebel's position today before this Court, the Sixth Circuit at Rebel's request set on Sep-

tember 25, 1990, a briefing schedule for this case.

In its Initial Brief, Rebel only pressed the argument that the Sixth Circuit should declare the ICC Decision herein null, void, and of no effect whatsoever because it was contrary to law. That was the sole basis of its appeal. It ignored the requirement that a filed rate be reasonable which this Court expounded in Maislin.

In its Initial Brief to the Sixth Circuit, Sunshine in reply argued that in the post-Maislin disposition of undercharge claims, there should be a determination by the ICC of whether the filed rate urged by the carrier was reasonable. That determination depends on an economic evaluation of the relevant market, the carrier's costs, and numerous other factors, as explicated at 49 U.S.C. 10701(e). The other factors include those found at Westing-

house Electric Corp. v. United States, 388 F. Supp. 1309 (USDC, W. D. Pa., 1975): existence of competition; the availability of return loads in the type of equipment used; rate level required in order to move the traffic; and comparison of the rate under consideration with established rates for comparable shipments in the territory involved.

It urged the Sixth Circuit to remand the case to the ICC for a determination of the reasonableness of the tariff rates sought by Rebel.

The ICC did not file a brief except to advise the Court that to the extent that a rate reasonableness issue remains, the case should be remanded back to the Commission, in accordance with the Sixth Circuit's holding in Orr, supra.

There was no oral argument before the Sixth Circuit, all parties having waived same.

The Sixth Circuit reversed the ICC decision which held for Sunshine on the basis that the negotiated rate was an unreasonable practice. It remanded the case to the ICC for a rate reasonableness determination. It further held that Sunshine is not required to pursue reparations as its sole remedy against Rebel, page 5. After observing that Maislin emphasized the statutory requirement that filed rates be "reasonable", it stated: "A footnote in Maislin also suggests a remand may be appropriate", and quoted footnote 10 in its entirety. It distinguished this case from the unpublished Branch Motor Express Company v. Caloric Corp., 914 F.2d 241 (3rd Cir. 1990), where the "shipper never supplied any support for its proposition that {the carrier's} rates were unreasonable...the lack of evidence in Branch Motor was the Third Circuit's reason for not remanding to the ICC..Sunshine is

prepared to put on evidence regarding the unreasonableness of the rates...Sunshine has not yet had an opportunity to present its evidence to the ICC...As a carrier subject to the jurisdiction of the Interstate Commerce Commission, Rebel had an obligation under section 10701 to keep its rates 'reasonable'. A remand to the ICC effectuates this purpose." (Emphasis added)

III. REASONS WHY THE WRIT SHOULD BE DENIED.

A. REBEL WAITED OVER TWO YEARS AFTER SHIPMENT TO CLAIM UNDERCHARGES AND PREVENTED SUNSHINE FROM UTILIZING THE REPARATIONS STATUTE, 49 U.S.C. 11705(b) (3)BECAUSE OF THE TWO YEAR STATUTE OF LIMITATIONS, 49 U.S.C. 11706(c)(2).

Assuming arguendo that Petitioner's position is well taken, the filed rate doctrine does not embrace an undercharge claim under these facts. It may be harsh, but it is not that harsh! Maislin does not contemplate such a result! Before that case is revisited within 15 months by this Court, the carrier claimant should at least have not waited until the

statute of limitations on the shipper has run, and then make claim, and file suit.

That is what happened here.

The last shipment from Memphis, TN to the Texas point was on December 30, 1983. In February, 1986, Rebel ceased operations and engaged the services of Professional Truck Auditing, Inc. to audit its freight bills for the discovery of any undercharge claims. It was not until early 1986, that Sunshine learned that the rate quoted and paid in 1983 had not been published in a tariff. Two years duration from the last shipment on December 30, 1983 ended on December 30, 1985, or a very few days thereafter. That was several weeks before Rebel in February, 1986 began to liquidate, and engaged the services of the auditor. It was the auditor who computed the exact amount on each of the alleged undercharges on each of the nine shipments, as listed at Joint Appen-

dix 16 below. The "balance due" bills of the auditor which were presented for the first time to Sunshine were all dated July 17, 1986. Rebel filed suit on September 20, 1986.

Sunshine urges that the reparations theory of Rebel is not applicable law. However, even if it were, it should not be applied in this case. Rebel did not bill or sue Sunshine for the charges now claimed to be due until more than two years after the shipments, by which time Sunshine's right to contest the rates before the Commission and seek reparation for any of the shipments had expired.

Under almost the same facts, the Second Circuit has held four months ago in James G. Duffy, Trustee v. BMC INDUSTRIES, INC., 938 F.2d 357-8 (2 Cir. 1991) at 357-8: the filed rate doctrine "need not be applied so strictly as to permit a carrier to delay billing beyond the two-year period of limitations governing

the shipper's reparations remedy...and then preclude an unreasonable rate defense in the carrier's subsequent suit..."

B. THE RULING BELOW FOLLOWS THE DECISIONS OF THIS COURT.

The most basic, significant, and indispensable element - "the essence" - of the question before this Court on certiorari, so Petitioner declares at page 7, is "whether a shipper may refuse to pay the filed tariff rate claiming it to be unreasonable."

Twice has this Court answered in the affirmative, and the Sixth Circuit's ruling below to that effect is consistent with these precedent cases.

In Pennsylvania R. Co. v. United States, 363 U.S. 202 (1960) a railroad sued in the Court of Claims the United States to recover additional charges. The Court suspended proceedings to enable the parties to have the Interstate Commerce Commission pass on the

reasonableness of the rates. It did so. The railroad was dissatisfied with the Commission's decision, and moved the Court of Claims to stay its proceeding pending a review of the ICC decision by a District Court. The Court of Claims refused to stay the case and entered a judgment in favor of the railroad for the lower amount which the Commission held to be recoverable. This court reversed, holding that the Court of Claims should have stayed the proceeding, pending the District Court's review of the reasonableness of the rates.

This Court in that case announced that it was "properly relying on our holding in United States v. Western Pacific R. Co., 352 U.S. 59, 62-70 (1956). Western Pacific involved a claim against the United States as a shipper for underpayments. The United States defended arguing that proper construction of the tariff required imposition of a lower rate, and in

the alternative, that the higher rate was unreasonable. This court held that the primary jurisdiction doctrine required that both of the questions be remanded to the ICC for determination. At page 69, this Court held: "The question of the reasonableness of rates is matter entrusted by Congress solely to the Interstate Commerce Commission." (Emphasis added).

In Lowden v. Simmonds-Shields-Lonsdale Grain Co., 306 U.S. 516 (1939) the amount involved was $624.00. The suit was begun by the railroad against the shipper who, as Sunshine below, refused to pay the tariff charge claimed by the carrier, a $1.00 per car charge for the installation of protective grain doors in the cars. Before trial in the District Court, the I.C.C. passed upon the validity and reasonableness of the charge for this particular service, and upheld it to the extent of $.60

per car. It awarded reparation to those who had paid $1.00 per car and authorized the carriers to waive collection of the amount over $.60 per car from shippers who had not paid. The carrier reduced its demand in the District Court to the $.60 per car. This Court affirmed the ICC's action.

In General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433, 60 S.Ct. 325, 331, 84 L.Ed. 361 (1940), this Court held:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act."

In that case, a lessee of railroad tank cars sued the lessor for sums due under a car leasing agreement. The District Court held for

the lessor, and the Court of Appeals reversed. This Court sent the case back to the District Court because "it should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Interstate Commerce Commission with respect to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act." page 329.

"Open for exploration" is the remand which was mandated by Maislin at fno. 10. That footnote could not be more comprehensive, more sweeping. It has no exact limits except that the objectives of the filed rate doctrine, as expounded within the rationale of the decision which was footnoted, must be accomplished.

Petitioner asserts that the Sixth Circuit below reasons "that footnote 10 effectively overruled this long line of precedential deci-

itself, concerning reparations". That "long line of precedential decisions" at pages 7-13 of the Petition date from 1907 to 1942. No infirmity, of course, attaches to older precedents. These cited by Rebel are just inapposite when these later decisions cited by Sunshine are considered. Pennsylvania, (1960), Western, (1956), and Lowden, (1939), supra, all fit Maislin's "exploration" which was ordered to further the filed rate doctrine. It will not be thwarted if the ICC decides the issue of reasonableness under the facts of this case. These precedents cited by Sunshine should be "explored" under the facts at bar by denying this Writ and sustaining the decision below.

Had Maislin intended that the 1907-42 cases relied on by Petitioner control on this plethora of undercharge and reasonableness-rate defense litigation, this Court in 1990

would have expanded and discussed them in footnote 10, or in the body of the Opinion, and cited and applied at least one of them. This Court knew on June 22, 1990 that this issue would be highly visible in the federal court system. At least seven Circuit Courts of Appeal in June, 1990 had rendered opinions on the issue. See footnote 1, page 2772.

Inclusion by this Court of the future resolution of the reasonableness issue in a footnote rather than in the main body of the opinion is important. That style in the opinion is significant. It can only mean that the ICC would determine any future reasonableness issues in undercharge suits. Had this Court decided to change on the reasonableness issues the primary jurisdiction relationship between the courts and that agency, it would have done so in the main body of the opinion, rather than in a footnote. "We have concluded that in

the circumstances here presented the question of...the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission", United States v. Western Pac. R. Co., supra. (Emphasis added.)

C. A. 15-MONTH REVISIT OF FOOTNOTE 10 IS NOT IN THE PUBLIC INTEREST FOR A CARRIER IN LIQUIDATION, SUCH AS PETITIONER REBEL, WHO SHALL NOT SERVE IN THE FUTURE THE PUBLIC WHOM THE FILED RATE DOCTRINE IS DESIGNED TO PROTECT, RATHER THAN REBEL'S CREDITORS AND STOCKHOLDERS.

The National Transportation Policy 49 U.S.C. 10101(a) (2) (D) provides "for...regulation...in regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to...enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions..." Petitioner in liquidation no longer is an objective of that Policy. Rebel has no future support or use of the filed rate doc-

trine. It will have no shipper customers who need protection from discrimination and unreasonable rates. No future enforcement of the filed rate doctrine will be served by applying it under the facts of this case, unless the ICC should decide to make an example of these facts for use as a deterrent to its violation, provided Rebel's rates are reasonable. That is a fact issue which only the ICC can decide.

Maislin's message is at 2769: "Compliance with Sec. 10761 and 10762 is "utterly central" to the administration of the Act. This is the future transportation scenario which concerns this court. No deterrent in the administration of Sections 10761-2 of the Act will occur should Rebel be required to prove before the ICC that its filed rate is reasonable. If it does so, or if it fails, then, the filed rate doctrine suffers not at all. If it is successful, the expert body can determine the extent

and nature of the recovery from Sunshine, for the proceeds will not go to the future transportation needs of the country which the Act exists to serve but to a non-carrier's stockholders and creditors, most of whom are not players in the for-hire carrier market. Especially not required for these few individuals' purposes are the judicial resources of this Court when the Sixth Circuit has sent these issues to the ICC.

One of the issues the ICC can resolve is the "payment first" requirement which Rebel urges. Should it convince the ICC that that is applicable law, then its solvency will be a proper issue. The records of Rebel's 1984 year-end financial condition reveal a $1.7 million to $1.9 million ratio of current assets to current liabilities for Rebel. Should reparations now become an issue before the ICC, Rebel's ability to pay seven or eight

years later any reparations will be an additional issue before the ICC.

D. PRIMARY JURISDICTION CRITERIA - NOT "PROOF" - BEOFRE A COURT IS REQUIRED FOR A RATE REASONABLENESS REFERENCE. IT WAS SATISFIED BELOW. REBEL MISSTATES RECORD.

In Distrigas of Massachusetts Corp. v. Boston Gas Co., 693 F.2d 1113 (1 Cir. 1983), the First Circuit sua sponte invoked the doctrine of primary jurisdiction in a suit between gas companies for money that each believed the other owed under tariffs filed with the Federal Energy Regulatory Commission governing terminalling and storage of liquefied natural gas. It held at 1117: "It is now well established that the doctrine is not waived by the failure of the parties to present it in the trial court or on appeal, since the doctrine exists for the proper distribution of power between judicial and administrative bodies and not for the convenience of the par-

ties".

The misleading part of Rebel's Petition in this regard is at page 27 where it misstates:

> "From the record it appears that all it[Sunshine] is going to attempt to prove is that the filed tariff rate is higher than the negotiated and now rejected rate. Clearly that is not a statutory basis for unreasonableness" (Emphasis added.)

These five factors other than the tariff rate being higher than the negotiated rate set forth in the Westinghouse case were explicated, and relied upon by Sunshine before the Sixth Circuit. They were the basis of that tribunal's finding that, "In this case, Sunshine is prepared to put on evidence regarding the unreasonableness of the rates." (Petition, 6a.)

Rebel misconstrues the law regarding a reference to the ICC by a court on the issue

of rate reasonableness under the doctrine of primary jurisdiction.

No precise quantum of proof is required if a Court is able to understand the issues. It is well settled law that an agency has primary jurisdiction to apply the law to the facts on a matter "arguably" within its statutory authority. Far East Conf. v. United States, 342 U.S. 570, 574-75(1952). Only a "likelihood" was required in Rohr Industries v. Wash Metro. Area Transit Authority 720 F.2d 1319 (D. C. Cir., 1983).

Rebel's argument at page 6 that Sunshine should not be allowed to change its defense at the appellate level means that Sunshine should not have been allowed to invoke the doctrine of primary jurisdiction before the Sixth Circuit. The weight of authority is to the contrary.

Rebel can hardly be "utterly central"

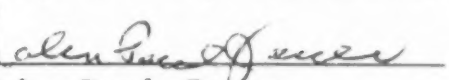
concerning the reasonableness of its subject rates. It has represented on November 19, 1990 in another undercharge case in the United States District Court for the Western District of Tennessee that it has destroyed its 1983 records. They are necessary to determine its costs. It may be "monumentally difficult to enforce the requirement that rates be reasonable" for the nine shipments for which Rebel claims undercharges. That also is one of the reasons why it attempts to have this Court foreclose any inquiry into the reasonableness of its 1983 rates.

IV. CONCLUSION.

For that and the other reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

Respectfully submitted,



John Paul Jones
Box 3140
Memphis, TN 38173
901-527-2482
Counsel of Record
for Respondent
Sunshine Mills, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have served this date a copy of the foregoing pleading by certified mail, return receipt requested, upon the following counsel of record:

1. James N. Clay, III, Esquire
   222 East Mallory Ave.
   Memphis, TN 38109

2. Henri F. Rush, Esquire
   Deputy General Counsel
   Interstate Commerce Commission
   Room 5211
   12th and Constitution Ave., N.W.
   Washington, D.C. 20423

Witness my signature this the 16th day of October, 1991.

